

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

WILLIAM BARTON,

Petitioner,

v.

JOSE COSTELO,

Respondent.

Case No. 2:22-cv-00904-JDP (HC)

ORDER THAT:

(1) THE CLERK OF COURT ASSIGN A DISTRICT JUDGE TO RULE ON THESE FINDINGS AND RECOMMENDATIONS

(2) PETITIONER'S SECOND APPLICATION TO PROCEED IN FORMA PAUPERIS BE GRANTED AND HIS FIRST BE DENIED AS MOOT

FINDINGS AND RECOMMENDATIONS THAT THE PETITION BE DISMISSED AS TIME-BARRED

ECF Nos. 5, 7, & 9

Petitioner, proceeding without counsel, seeks a writ of habeas corpus under 28 U.S.C. § 2254. He alleges that a guilty plea that led to a 1976 murder conviction was not voluntary and intelligent. ECF No. 1 at 1, 4.¹ This claim is time-barred and should be dismissed. I will also grant petitioner's second application to proceed in forma pauperis, ECF No. 7, and deny his first, ECF No. 5, as moot.

The petition is before me for preliminary review under Rule 4 of the Rules Governing Section 2254 Cases. Under Rule 4, the judge assigned to the habeas proceeding must examine the habeas petition and order a response to the petition unless it "plainly appears" that the

¹ Petitioner filed a similar petition in *Barton v. Gastelo*, 21-CV-1933-KJM-JDP, which I also recommended be dismissed at ECF No. 12 in that case.

petitioner is not entitled to relief. *See Valdez v. Montgomery*, 918 F.3d 687, 693 (9th Cir. 2019); *Boyd v. Thompson*, 147 F.3d 1124, 1127 (9th Cir. 1998).

Petitioner's claim, because it concerns a conviction that was finalized more than forty years ago, is time-barred. It was finalized before the Anti-Terrorism and Effective Death Penalty Act of 1996 and, thus, petitioner had until April 24, 1997 to file a petition attacking his 1976 conviction. *See Patterson v. Stewart*, 251 F.3d 1243, 1246 (9th Cir. 2001) ("We therefore hold that AEDPA's one-year grace period for challenging convictions finalized before AEDPA's enactment date is governed by Rule 6(a) and ended on April 24, 1997 in the absence of statutory tolling."). Petitioner has not identified any source of statutory tolling, much less a source sufficient to render a more than forty-year old claim timely. Given the age of the claim, I conclude that dismissal without leave to amend is appropriate. Plaintiff may address why tolling should apply, if at all, in his objections to these recommendations.

It is ORDERED that:

1. The Clerk of Court shall assign a district judge to this action.

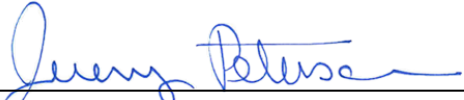
2. Petitioner's application to proceed *in forma pauperis*, ECF No. 7, is GRANTED and his application to proceed *in forma pauperis*, ECF No. 5, is DENIED as MOOT.

Further it is RECOMMENDED that the petition, ECF No. 1, be DISMISSED without leave to amend as time-barred.

These findings and recommendations are submitted to the U.S. District Court Judge presiding over this case under 28 U.S.C. § 636(b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court, Eastern District of California. Within fourteen days of service of the findings and recommendations, petitioner may file written objections to the findings and recommendations with the court and serve a copy on all parties. That document must be captioned "Objections to Magistrate Judge's Findings and Recommendations." The District Judge will then review the findings and recommendations under 28 U.S.C. § 636(b)(1)(C).

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2 IT IS SO ORDERED.

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4 Dated: July 28, 2022


JEREMY D. PETERSON
UNITED STATES MAGISTRATE JUDGE